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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

MONTE GEORGE HOFFMAN)

Petitioner-Appellant,)

vs.)

STATE OF IDAHO,)

Respondent.)

NO. 37938

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

HONORABLE ROBERT C. NAFTZ
District Judge

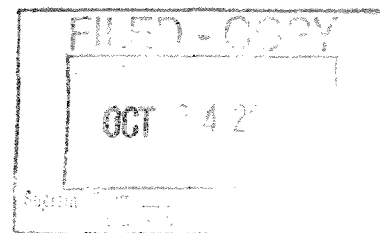
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STATEMENT OF THE CASE

Nature Of The Case

Monte George Hoffman appeals from the district court's order summarily dismissing his petition for post-conviction relief, contending the court improperly took judicial notice of the underlying criminal record and erred in summarily dismissing several of the claims alleged in his post-conviction petition.

Statement Of Facts And Course Of The Underlying Proceedings

The state charged Hoffman with, and he pled guilty to, possession of methamphetamine in Bannock County Case No. CR-2008-206-FE.¹ (Supp. R., pp.24-25; R., pp.180-181.) Hoffman subsequently filed a motion to withdraw his guilty plea, which he later withdrew, and the court imposed a unified six-year sentence with two years fixed and retained jurisdiction. (Supp. R., pp.31-32, 34-36.) At the conclusion of the retained jurisdiction review period, the court relinquished jurisdiction and ordered Hoffman's sentence executed. (Supp. R., pp.38-39.) Pursuant to a Rule 35 motion, the court reduced Hoffman's sentence to a unified term of four years with two years fixed. (Supp. R., pp.41-42.)

Hoffman filed a timely *pro se* petition for post-conviction relief alleging "illegal search and siezure [sic], illegal sentence, failure to provide discovery, ineffective assistance of counsel from (4) different attornies [sic]." (R., p.2 (capitalization altered).) Hoffman also alleged (1) "counsel failed to produce

¹ The state also charged Hoffman with a persistent violator enhancement (Supp. R., pp.26-27), which was dismissed pursuant to a plea agreement (Tr., p.7, Ls.7-24, p.14, Ls.19-21).

discovery and file appeal,” file a motion to suppress, file a motion to withdraw his guilty plea, “persue [sic] any defenses that otherwise could have been available,” “insure [sic] that [he] be allowed an opportunity of [sic] allocution” at his retained jurisdiction review hearing or present evidence in his favor at that hearing, or “negotiate the terms [he] asked for on a Rule 35 Motion;” (2) he was “threatened or coerced into the plea of guilt and was wrongfully convicted for a possession over a simply paraphenilia [sic] that was illegally searched and seized [sic] from a vehicle that did not belong to [him].” (R., pp.2-3, 17-18 (capitalization altered).) The district court granted Hoffman’s request for the appointment of counsel to represent him in his post-conviction case. (R., pp.51-54, 60-61.)

The state filed an answer and a motion for preparation of the transcript of the Rule 35 hearing conducted in Hoffman’s underlying criminal case, which motion was granted. (R., pp.66-67, 78-81.) Hoffman, through counsel, filed a “Brief in Support of Post Conviction Relief and Response to State’s Answer” in which he reiterated Hoffman’s claims and asserted “there are genuine issues of material fact” entitling Hoffman to an evidentiary hearing. (R., pp.84-90.) Approximately three months later, the court issued a notice of intent to dismiss (“Notice”). (R., pp.92-117.) In its Notice, the court indicated it had “carefully reviewed the Petition and Affidavit for Post Conviction Relief, the Affidavit of Facts in Support of Post Conviction Relief, the Brief in Support of Post Conviction Relief, the Answer and the record in the underlying case.” (R., p.94.) “Based upon [its] examination of the entire record,” the court advised Hoffman of its intent to dismiss his petition, setting forth, in detail, the reasons for its intended

dismissal of each claim. (R., pp.94-117.) The court's Notice gave Hoffman twenty days in which to "allege[] facts sufficient to raise the possibility of a valid claim, rather than bare, conclusory allegations." (R., pp.116-117 (emphasis original).)

Despite the fact that he was represented by counsel (pursuant to his request for such), Hoffman filed a *pro se* motion for an extension of time to respond to the court's Notice, which the court granted. (R., pp.122-123, 155.) Ten days later, Hoffman filed a *pro se* "Modified Motion for Post Conviction Relief, and Attatched [sic] Affidavit in Support."² (R., pp.124-130.) Hoffman also filed a *pro se* "Memorandum in Support of Post Conviction Relief." (R., pp.138-154.) The court thereafter entered an order dismissing Hoffman's petition. (R., pp.155-165.) Hoffman, through counsel, filed a timely notice of appeal. (R., pp.166-168.)

² Although the title of the pleading Hoffman filed indicated there was an affidavit attached, no separate affidavit was filed with the court. (See generally R., pp.124-154; see also pp.155-156.) The "Modified Motion" was, however, notarized. (R., p.130.)

ISSUES

Hoffman states the issues on appeal as:

1. Did the district court err when, in summarily dismissing Mr. Hoffman's petition for post conviction relief, it improperly took judicial notice of "the record in the underlying case?"
2. Did the district court err when, in summarily dismissing Mr. Hoffman's petition for post conviction relief, it failed to consider the factual allegations made in Mr. Hoffman's verified pleadings?
3. Did the district court err when it summary dismissed Mr. Hoffman's claims of ineffective assistance of counsel?
4. Did the district court err when it summarily dismissed Mr. Hoffman's claim that his plea was not entered knowingly, intelligently, or voluntarily because it was the result of ineffective assistance of counsel?

(Appellant's Brief, p.12.)

The state rephrases the issues³ on appeal as:

With the exception of his claim that counsel was ineffective for failing to file a suppression motion, has Hoffman failed to meet his burden of establishing he raised a genuine issue of material fact that would entitle him to an evidentiary hearing on any of his other claims?

³ In the state's view, Hoffman's first two issues on appeal are not distinct substantive issues but are more akin to arguments that may be made in response to the state's brief and/or in relation to whether summary dismissal of a particular claim was appropriate. The state will, therefore, only address Hoffman's arguments regarding the scope of the district court's judicial notice and whether his pleadings raise a genuine issue of material fact to the extent they are relevant to a specific claim.

ARGUMENT

Hoffman Failed To Raise A Genuine Issue Of Material Fact That Would Entitle Him To An Evidentiary Hearing On Any Claim Except His Claim That Counsel Was Ineffective For Failing To File A Suppression Motion

A. Introduction

Hoffman asserts the district court erred in summarily dismissing some of his claims, arguing he raised “genuine issues of material fact” on a number of claims that warranted an evidentiary hearing. (Appellant’s Brief, pp.17-18, 52.) With one exception, Hoffman is incorrect. A review of the record shows Hoffman only raised a genuine issue of material fact on his claim that counsel was ineffective for failing to file a suppression motion. All of Hoffman’s remaining claims were properly dismissed without an evidentiary hearing.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The State Concedes Hoffman Raised A Genuine Issue Of Material Fact On His Claim That Counsel Was Ineffective For Failing To File A Suppression Motion

In his petition, Hoffman asserted that all four of his attorneys were ineffective for failing to file a motion to suppress.⁴ (R., p.3.) The facts Hoffman alleged in support of his claim that a motion to suppress would have been viable include: (1) the traffic stop which culminated in the search was based on a non-functioning headlight, but Hoffman claims the headlight was working; (2) although Hoffman was driving the vehicle that was searched, it did not belong to him; (3) “[t]he search was conducted without consent by either [Hoffman] or the actual owner of the vehicle;” (4) the “inventory search [sic] improperly conducted, as it fell outside of the scope and procedures of an inventory search;” (5) the “search was conducted for investigative reasons and not for inventory purposes;”(6) he was “already detained prior to the search of the trunk and was only being charged with several misdemeanors [sic] prior to whatever was discovered in the trunk;” and (6) “any evidence seized after [Hoffman] was detained should not of [sic] been admissible evidence since it was not in [his] immediate reach.” (R., pp.6-8; see also pp.10, 15-16, 20-21, 25-26 (capitalization altered).)

⁴ On appeal, however, Hoffman concedes that his fourth attorney could not be ineffective for failing to do so because Hoffman did not retain him until after he pled guilty. (Appellant's Brief, p.37; see R., p.36.) The state submits that this allegation also does not apply to any attorney who represented Hoffman after the deadline for filing a motion to suppress, particularly since Hoffman has failed to articulate any “good cause” or “excusable neglect” that would have relieved him of failing to comply with the filing deadline. I.C.R. 12(d). Nevertheless, because Hoffman was represented by an attorney during the timeframe in which a suppression motion could have been filed, the state will respond to the general allegation that *an* attorney should have filed such a motion.

The court notified Hoffman of its intent to dismiss this claim on the ground that it was a "conclusory allegation" unsupported by a "factual basis" or evidence.

(R., p.103.) The court also stated:

Furthermore, a petitioner in a post-conviction proceeding is not allowed to raise any issue that could have been raised on a direct appeal, but was not so raised, unless those issues were not known and could not have reasonably been known at the time of the appeal. . . .

Just as importantly, Mr. Hoffman did not raise this issue at the time he entered his guilty plea, at which time he waived all claims he might have for violations of civil and constitutional rights. A valid plea of guilty, voluntarily and understandingly [sic] given, waives all non-jurisdictional defects and defenses, whether constitutional or statutory. In the Guilty Questionnaire signed by Mr. Hoffman, he agreed that he was waiving all constitutional rights by pleading guilty and did not claim any violation of his constitutional or civil rights.

(R., pp.103-104 (citations omitted).) The court also informed Hoffman that the suppression claim was not "cognizable" in post-conviction because "a post conviction proceeding is not the forum to make a claim regarding failure to suppress evidence allegedly illegally seized." (R., p.104.)

In response to the court's Notice, Hoffman filed a memorandum, stating, in part: "Absent consent, only exigency's [sic] such as fear of imminent destruction of evidence, hot pursuit, and **immediate threats to the safety** of the public or the officers can justify a warrantless search." (R., p.144 (emphasis original).) The court subsequently dismissed Hoffman's claim relating to the suppression issue, reiterating its position that Hoffman failed to support his claims with "competent and admissible evidence." (R., p.164.)

On appeal, Hoffman asserts summary dismissal of his claim that his attorneys were ineffective for failing to file a suppression motion was error because, he argues: (1) his “unrebutted factual assertions [when] taken as true” demonstrate the traffic stop and search of his car violated the Fourth Amendment; (2) he could not have raised the claim on direct appeal; and (3) he waived his suppression claim by pleading guilty. (Appellant’s Brief, pp.37-45.) The state concedes that Hoffman could not have raised his ineffective assistance of counsel claim on direct appeal and did not waive the claim by pleading guilty. Consequently, dismissal on either basis would be improper.

The state also concedes that, pursuant to Baldwin v. State, 145 Idaho 148, 177 P.3d 362 (2008), Hoffman raised a genuine issue of material fact that would entitle him to an evidentiary hearing on whether there was reasonable articulable suspicion to support the traffic stop.⁵ In Baldwin, the petitioner

⁵ The state does not, however, concede that Hoffman raised a genuine issue of material fact that counsel was ineffective for failing to file a motion to suppress based on the search of the vehicle. Hoffman essentially asserted two grounds in support of this claim: (1) the car he was driving was not his and neither he nor the owner consented to the search, and (2) he was detained at the time of the search such that the car was not within his reach. (R., pp.6-8, 0, 15-16, 20-21, 25-26.) Neither ground would support a motion to suppress. With respect to the first ground, if the car did not belong to Hoffman, as he contends, he would not have standing to challenge the search of the car. See State v. Bordeaux, 148 Idaho 1, 9, 217 P.3d 1, 9 (Ct. App. 2009) (“Generally, only the owner of a vehicle has standing to directly challenge an illegal search. Idaho courts have consistently held that a passenger in a vehicle subject to an allegedly illegal search generally does not have standing to object to the search of the car. A passenger who has no proprietary interest in the vehicle lacks a reasonable expectation of privacy, and therefore, standing to challenge a search where the driver has consented.”). With respect to the second ground, this argument is based upon the United States Supreme Court’s opinion in Arizona v. Gant, 556 U.S. 332 (2009). Hoffman could not have based a motion to suppress on Gant,

alleged, in relevant part, that his attorney was ineffective for failing to “file a motion to suppress what he allege[d] was illegally seized heroin.” 145 Idaho at 155, 177 P.3d at 369. The district court summarily dismissed the claim reasoning that the evidence was properly seized based on the plain view exception or, alternatively, the stop and frisk exception. Id. The Idaho Supreme Court reversed, finding that this conclusion was correct only if the court accepted the detectives’ account as true, which account was obtained from the detectives’ report. Id. Because the district court was required to accept Baldwin’s allegations as true, and because Baldwin alleged facts demonstrating the evidence was not seized pursuant to either exception, there was a genuine issue of material fact that entitled Baldwin to an evidentiary hearing to present evidence in support of his allegations. Id. at 155-156, 177 P.3d at 369-370.

Similarly, Hoffman alleged that, contrary to the officer’s claim that his headlight was not functioning, which was the basis for the traffic stop, “both headlights were in working order.” (R., p.6 (capitalization altered).) Hoffman, therefore, alleged a genuine issue of material fact that would entitle him to an evidentiary hearing on whether the initiation of the traffic stop complied with the Fourth Amendment.

D. Hoffman Has Failed To Establish He Was Entitled To An Evidentiary Hearing On Any Of His Remaining Claims

Hoffman argues the district court erred in summarily dismissing his claims that counsel was ineffective for failing to file a request for discovery and

however, because Gant was not decided until April 21, 2009, approximately six months after judgment was entered in his case.

“adequately consult” with him about filing an appeal. (Appellant’s Brief, pp.21-51.) Hoffman further asserts that the district court erred in summarily dismissing his claim that his plea was invalid due to “counsels’ failure to request discovery, failure to file a motion to suppress, and failure to inform him of, or to pursue, defenses to the charge.” (Appellant’s Brief, p.52.) Hoffman has failed to establish error in the summary dismissal of these claims because a review of the pleadings reveals the claims are either waived or Hoffman failed to raise a genuine issue of material fact that would warrant a hearing.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party’s motion or on the court’s own initiative. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, when a post-conviction petitioner alleges ineffective assistance of counsel, in order to survive summary dismissal of his petition, he must specifically allege that “(1) a material issue of fact exists as to whether counsel’s performance was deficient, and (2) a material issue of fact exists as to whether the deficiency prejudiced the applicant’s case.” Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted). “To establish deficient assistance, the burden is on the petitioner to show that his attorney’s conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that

trial counsel was competent and diligent.” Id. “[S]trategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.” Id. “To establish prejudice, the claimant must show a reasonable probability that but for his attorney’s deficient performance the outcome of the proceeding would have been different.” Id.

1. Hoffman Failed To Raise A Genuine Issue Of Material Fact That Counsel Were Ineffective With Respect To Discovery

Several different attorneys represented Hoffman during the course of his underlying criminal case. (See R., pp.3, 36, 42-43.) In his petition, and throughout his pleadings, Hoffman asserted all of his attorneys were ineffective for failing to provide him with discovery. (R., pp.2, 3, 10, 12, 13, 1, 16, 20, 26, 29, 127-128, 140.) In his brief filed in support of his petition, Hoffman also asserted counsel “failed to file and review discovery” with him. (R., p.87.) According to Hoffman, he was prejudiced by counsels’ failure to do so because discovery would have revealed “obvious” defenses that could have been pursued. (R., p.15.) Specifically, Hoffman asserted discovery would have shown “that the paraphenillia [sic] that was supposedly found in the trunk of a vehicle” was not on his “‘person,’ ‘nexus,’ or in his ‘possession.’” (R., p.15.)

In its Notice, the district court concluded summary dismissal of this claim was appropriate because “the record shows that a Request for Discovery was filed on March 13, 2008.” (R., p.102.) The court further stated:

[Hoffman] supplies no additional facts that would reasonably merit further investigation, nor does he provide evidence of any discovery

that his attorney(s) failed to complete. Furthermore, [Hoffman] did not offer any specifics regarding his contention that his counsel did not review the evidence with him. Even accepting as true that his attorney(s) did not provide him with materials or discuss the case, [Hoffman] presents no evidence, or even an allegation, about how further discussions with his attorney would have changed the outcome of his case.

(R., p.102.) Thus, the court concluded, Hoffman failed to satisfy “his burden of demonstrating that his counsel’s conduct was deficient . . . and that he was prejudiced as a result of any deficient conduct.” (R., p.102.)

The district court revisited Hoffman’s claim that counsel denied him discovery in its final order of dismissal (R., p.161), noting Hoffman’s arguments in response to the Notice wherein Hoffman essentially reiterated his allegation that none of his attorneys provided him with “required discovery” (R., pp.127-128).

On appeal, Hoffman correctly notes that the request for discovery filed on March 13, 2008, and referred to by the district in its Notice was a request filed by the prosecutor, not by defense counsel. (Appellant’s Brief, p.24; see R., pp.177-179 (state’s discovery request).) The state agrees that the discovery request filed by the prosecutor is not relevant to Hoffman’s claim his attorneys were ineffective for failing to request discovery and/or provide discovery to him. (Appellant’s Brief, p.24.) The court’s erroneous reliance on the state’s discovery request does not, however, mean that Hoffman satisfied his burden of alleging a prima facie case of ineffective assistance of counsel for allegedly failing to obtain or share discovery with Hoffman.

As to the claim that counsel was ineffective for failing to request discovery, Hoffman failed to allege any basis for concluding he actually had personal

knowledge regarding any of his attorney's efforts to obtain discovery. He apparently just assumes they did not based on his assertion that counsel never provided discovery to him. Hoffman's assumptions about what counsel did or did not do are insufficient to create a genuine issue of material fact. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) ("an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant"); see Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982) (factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing).

Hoffman's claim that none of his attorneys provided him with discovery is contradicted by the record. A letter submitted by Hoffman indicates that at least one of his attorneys provided him with the police reports. (R., p.36 (letter from counsel indicating he was "enclosing all of the police reports that were provided to [him] by the Bannock County Prosecutor's office").) While a district court is required to accept un rebutted allegations as true, allegations that are "clearly disproved by the record of the original proceedings" are insufficient. Workman, 144 Idaho at 522, 164 P.3d at 802. Moreover, the district court was not required to accept Hoffman's legal conclusion, *i.e.*, that he was prejudiced as a result of his counsels' alleged deficiencies. Id.

Even if the information in the record is not adequate to disprove Hoffman's claim that none of his attorneys ever provided discovery, the mere failure to provide discovery does not establish prejudice. Rather, Hoffman had the burden of alleging a genuine issue of material fact that the discovery would have

contained information that would have allowed him to pursue a defense that he could not have pursued absent the discovery. (See R., p.15 (Hoffman's claim of prejudice is that discovery would have revealed "obvious" defenses that could have been pursued).) Hoffman seems to claim that he satisfied his burden of showing this specific prejudice because he "asserted facts which would have resulted in the suppression of evidence of possession of a controlled substance." (Appellant's Brief, p.30; see also pp.31-33.) Hoffman also argues that "[h]ad counsel not performed deficiently, counsel would have discovered evidence that police found the paraphernalia with methamphetamine residue in the trunk of a car and [sic] that [he] did not own, but was merely driving." (Appellant's Brief, p.34.) Hoffman claims "[t]his coupled with [his] lack of prior knowledge of the item, and the fact that he was only test driving the car for fifteen minutes before the stop occurred established a reasonable defense to the charge of possession of a controlled substance."⁶ (Appellant's Brief, p.34.) This claim of prejudice lacks merit.

⁶ Hoffman also asserts that the district court applied an incorrect legal standard to his claim of prejudice based upon the language in the dismissal order where the court states Hoffman failed to "demonstrate prejudice, as he offered no evidence that the outcome of his case would have been different but for his attorneys' unprofessional errors." (Appellant's Brief, p.29; R., p.164.) Hoffman notes that the correct standard is not whether the result "would have been different" but whether there is a reasonable probability that it would have been different. (Appellant's Brief, p.29.) While the court did not use the exact language from Strickland in its conclusion regarding Hoffman's failure to sufficiently allege prejudice, the court's Notice demonstrates the court was aware of the applicable legal standard. (R., p.100.) The court's imprecise restatement of the standard does not demonstrate the court actually applied the incorrect standard or otherwise establish a basis for reversal.

Exactly how Hoffman's factual assertions relating to the circumstances surrounding his arrest and subsequent search demonstrate prejudice arising from the alleged failure to share discovery with him is unclear. Hoffman was obviously aware of these facts regardless of discovery and could have shared his version of events with counsel. Indeed, Hoffman claimed in his Affidavit of Facts that had his attorney "listened to [his] claims of innocence and [sic] that [he] had just picked up the vehicle not fifteen minutes after someone else was driving the vehicle, th[e]n [counsel] could have had his case overturned on lack of evidence." (R., pp.15-16.) Even if counsel failed to share any discovery with Hoffman, he failed to allege how "discovery" would have supported his claimed defense such that the failure to share discovery prejudiced his ability to pursue a defense. Hoffman attempts to overcome this fatal flaw by arguing that he should be excused from his burden of providing actual evidence to support his claims because he "recited why the necessary documents were not attached." (Appellant's Brief, p.36.) Specifically, Hoffman relies on his claims to the district court that he never received discovery in his criminal case and post-conviction counsel did not assist him in obtaining that discovery. (Appellant's Brief, pp.35-36.) Hoffman also appears to argue that the district court should have ordered discovery in his post-conviction case based on his claims that the discovery from his criminal case had never been provided. (See Appellant's Brief, p.36 (arguing summary dismissal is not appropriate under I.C. § 19-4906(b) because further proceedings addressing his "renewed request for counsel and conducting discovery . . . would serve the purpose of providing [him] with the documents he

asserted would support his claims”).) These arguments fail for at least two reasons.

First, as previously noted, the record disproves Hoffman’s claim that none of his defense attorneys ever provided him with discovery. (R., p.36.) It also disproves any claim that, at a minimum, the attorney who represented him at his change of plea did not discuss potential defenses with him. (7/7/08 Tr., p.11, L.23 – p.12, L.1.)

Second, to the extent Hoffman wanted to seek discovery through his post-conviction case, he should have filed a motion requesting leave to do so; he did not. Hoffman should not be permitted to predicate error on the district court’s failure to order discovery in this case when he never filed a discovery motion requesting such. Moreover, it is unlikely a request for discovery would be granted based on Hoffman’s speculative belief that the documents he seeks would support his claims; such speculation is inadequate to engage in discovery in post-conviction. Raudebaugh v. State, 135 Idaho 602, 21 P.3d 924 (2001); Murphy v. State, 143 Idaho 139, 148, 139 P.3d 741, 750 (Ct. App. 2006) (“‘Fishing expedition’ discovery should not be allowed. The UPCPA provides a forum for known grievances, not an opportunity to research for grievances.”).

Because Hoffman failed to establish a genuine issue of material fact related to his claim that counsel were ineffective for failing to “produce” discovery, he has failed to show error in the district court’s summary dismissal of this claim.

2. Hoffman Failed To Raise A Genuine Issue Of Material Fact That Counsel Was Ineffective For Failing To File An Appeal

Hoffman alleged in his petition that his attorney was ineffective for failing to file an appeal “of the original sentence,” which Hoffman claims he asked counsel to do “through letters” and “family members calling.” (R., pp.3, 18.) The district court correctly concluded Hoffman was not entitled to a hearing on this claim because it was disproved by the record.

The court entered judgment in Hoffman’s underlying criminal case on October 20, 2008, at which time the court retained jurisdiction. (Supp. R., pp.34-36.) The court relinquished jurisdiction on March 12, 2009. (Supp. R., pp.38-39.) Hoffman was, therefore, required to file his notice of appeal no later than April 23, 2009. I.A.R. 14(a).

The attorney who represented Hoffman at sentencing sent Hoffman a letter dated October 23, 2008, three days after judgment was entered, advising him:

[I]f you are dissatisfied with the judgment entered by the court [in this case], you have the right to appeal the judgment. The time by which you must file your appeal is 42 days from the date of conviction. Should you wish to file a Notice of Appeal, you must notify my office immediately with grounds that are appealable.

An appeal must be based upon legal grounds such as ineffective assistance of counsel, a decision in which the judge abuses discretion, or an evidentiary question that was not properly ruled upon (this is not a complete list of reasons to appeal, but are only given as examples). **I do not see a reason to appeal or I would have discussed it with you already.**

...

If you choose to exercise your right to appeal or file a Rule 35 Motion but fail to do so within the time limits listed above, you

will lose your right to exercise those rights. If you want to exercise either of these rights, even though I have advised against this action at this time, or have any questions, please contact my office.

(R., pp.37-38 (emphasis original).)

Hoffman attached the foregoing letter to his petition and included a handwritten note at the bottom, which reads: "I tried to contact [counsel] after receiving this so that I could file an appeal [sic] and a Rule 35." (R., p.37 (capitalization altered).) Although Hoffman alleged in his petition that he actually asked counsel to file an appeal "through letters" and "family members calling" (R., p.18), the documents he offered in support of his claim do not support his allegation. Indeed, the handwritten note on the October 23, 2008 letter from counsel makes clear that Hoffman never actually asked counsel to file a direct appeal; rather, he only "tried to contact [counsel]" to ask him to do so. This handwritten assertion is consistent with the other documents Hoffman attached to his petition. Specifically, Hoffman provided a handwritten list of dates on which he purportedly attempted to contact counsel, beginning May 15, presumably of 2009. (R., p.41.) This list further indicates that after unsuccessfully attempting to reach counsel on the phone, Hoffman sent a letter on May 27. (R., p.41.) This is consistent with a copy of a letter Hoffman submitted dated May 26, 2009. (R., p.33.) That letter, however, makes it apparent that Hoffman's efforts to contact counsel starting May 15, 2009, had nothing to do with Hoffman's desire to file an appeal. Hoffman's May 26, 2009 letter instead reflects Hoffman's desire to obtain information to support his post-conviction petition. (R., p.33.) Hoffman also submitted a copy of a second letter

dated June 20, 2009, which references the May 26 letter, complains of counsel's failure to respond, and repeats the same requests made in his May 15 letter, *i.e.*, for documents and information to support his post-conviction claims.

The only evidence Hoffman submitted in support of his claim that he also had family members call is a letter written by his mother wherein she indicates that she and her granddaughter tried to contact Hoffman's attorney. (R., p.35.) However, that letter, which is dated August 3, 2009, also appears to relate only to Hoffman's efforts pertaining to his post-conviction case, and says nothing of Hoffman's desire to file an appeal. (R., p.35.) Moreover, that letter is not addressed to Hoffman's attorney, but seems to be a document prepared only for the purpose of supporting Hoffman's post-conviction petition as it relates her efforts, and her granddaughter's efforts, to contact counsel, and is notarized as one would expect an affidavit in support of a petition to be. (R., p.35.)

In summarily dismissing Hoffman's claim that counsel was ineffective for failing to file a direct appeal, the district court found that Hoffman's allegation was disproved by the record. (R., p.105.) Specifically, the court references the letters Hoffman attached to his petition in support of his claim, which included the May 26 and June 20 letters he wrote, the letter written by Hoffman's mother, and the two letters he received from his attorney, and correctly notes that none of the letters support Hoffman's claim that he actually asked counsel to file an appeal. (R., pp.105-106.)

On appeal, Hoffman argues the “district court incorrectly determined that [this] claim was disproved by the record.” (Appellant’s Brief, p.46.) Specifically, Hoffman asserts:

Although [he] attach[ed] copies of the letters he had sent to [counsel], after the time to appeal had expired, which did not include specific requests that an appeal be filed, he did not assert that this was the only contact he had with [counsel], and it was not the sum total of the facts alleged. [His] verified pleadings additionally asserted that, [he] “specifically asked/requested [counsel] to file a Direct appeal of the original sentence through letters, family members calling.” (R., p.18 [capitalization original].)

(Appellant’s Brief, p.46.)

This argument should be rejected because it requires the Court to ignore the very evidence Hoffman offered in support of his claim and consider only the first half of the allegation – that Hoffman asked counsel to file a direct appeal.

Hoffman also argues that “[e]ven if [he] had not specifically requested that [counsel] file a notice of appeal,” because counsel’s advice “regarding his appellate rights was patently incorrect,” counsel was ineffective because he did not “adequately consult with [him] regarding the filing of an appeal.” (Appellant’s Brief, p.47.) This Court should reject this claim because it is being raised for the first time on appeal. “Idaho Code section 19-4903 mandates that the application for post-conviction relief ‘specifically set forth the grounds upon which the application is based All grounds for relief . . . must be raised in [the defendant’s] original, supplemental, or amended **application**.’ I.C. § 19-4908.” Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (emphasis added, alteration original). Claims not raised in Hoffman’s application should not be considered for the first time on appeal. Dunlap, 141 Idaho at 56-58, 106 P.3d at

382-84. Nowhere in his petition did Hoffman assert a claim that his counsel was ineffective for failing to adequately advise him regarding his appellate rights.⁷ Any such claim is, therefore, not preserved for appeal and this Court should not consider it.

3. Hoffman Failed To Raise A Genuine Issue Of Material Fact That His Guilty Plea Was Invalid

In his petition, Hoffman alleged that he was “threatened or coerced into the plea of guilt” and that he “merely plead [sic] guilty after being threatened with the peristant [sic] violator and coercion from appointed counsel and state prosecutor.” (R., p.2 (capitalization altered).) In addition to his claims that counsel was ineffective in relation to discovery and in failing to file a motion to suppress, Hoffman also alleged in his petition that counsel was ineffective for failing to pursue any defenses. (R., p.3.) Post-conviction counsel restated these particular claims as follows:

In the matter at hand, the Petitioner, Monte G. Hoffman, contends he is entitled to post conviction relief because there are genuine issues of material fact which support his allegations of ineffective assistance of counsel; that is, he is alleging that (1) his former counsel failed to adequately investigate the facts, witnesses and circumstances of the case, failed to file a motion to suppress as there was an illegal seizure and search; failed to file and review discovery with the Petitioner; failed to review any defenses with the Petitioner; failed to timely file an appeal; thus, was [sic] ineffective

⁷ Although Hoffman argued in the memorandum filed in support of his “Modified Motion for Post Conviction” that “[c]ounsel failed to consult with [him] on appeal options and failed or refused to file said appeal” (R., p.143), this *argument* does not constitute a *claim* that must be alleged in the petition. Furthermore, Hoffman did not allege any facts to support such a claim. While all of Hoffman’s arguments on appeal in support of this “claim” are based on information contained in the record, that information was not presented as facts in support of any claim that counsel did not adequately advise him of his appellate rights.

assistance of counsel; (2) that the Petitioner was threatened and coerced into pleading guilty by former counsel and the state prosecutor in that he would be sentenced as a persistent violator if he did not accept the plea agreement; (3) that his decision to enter the guilty plea was made under duress; thus, the guilty plea was not made voluntarily, knowingly and intelligently[.]

(R., p.87.)

The district court notified Hoffman of its intent to dismiss each of these claims and the reasons for dismissal (see generally R., pp.101-113) and subsequently dismissed the claims (R., pp.155-165).

On appeal, Hoffman lumps all of the foregoing claims together in support of an argument that the district court erred in summarily dismissing his “claim” that his plea was not knowing, intelligent, or voluntary. (Appellant’s Brief, p.52.) Hoffman also complains that the district court “interpreted [his] claims regarding the failure to pursue or inform him of defenses as merely an ineffective assistance of counsel claim.” (Appellant’s Brief, p.52.) The district court addressed Hoffman’s claims as they were presented to him. This Court should reject both of the foregoing complaints because they are predicated on re-characterizing the claims as they were presented to the district court.

Hoffman also complains “that the district court erred when it relied upon the records of the taking of his guilty plea, to the exclusion of other evidence regarding the circumstances of the entry of the plea, to determine that the plea was knowingly, intelligently, and voluntarily entered.” (Appellant’s Brief, p.53.) While it is true, as Hoffman notes, that the district court referred to the change of plea hearing and the guilty plea questionnaire in dismissing Hoffman’s claims that his counsel was ineffective for failing to pursue any possible defenses (R.,

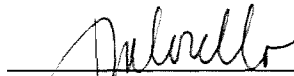
pp.106-108) and his claim that his plea was coerced (R., pp.109-112), it is unclear what other evidence Hoffman believes the court should have considered in relation to these specific claims. Hoffman merely contends the court limited its consideration "to the record of the taking of the plea, to the exclusion of other evidence in the post conviction record regarding the circumstances of the entry of the plea." (Appellant's Brief, p.55.) To the extent Hoffman believes the district court should have considered his other complaints about counsel that were alleged as the basis for different claims in addition to the specific factual allegations offered in support of his claim that his plea was coerced and that counsel was ineffective for failing to pursue any possible defenses, no such burden exists for the district court. See Esser Elec. V. Lost River Ballistics Technologies, Inc., 145 Idaho 912, 188 P.3d 854 (2008) ("the trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court's attention").

Having failed to show how the district court erred in summarily dismissing any claim that was actually alleged in the petition, other than the claim that counsel was ineffective for failing to file a motion to suppress, Hoffman has failed to demonstrate he is entitled to remand for an evidentiary hearing on any claim other than the one conceded by the state.

CONCLUSION

The state respectfully requests this Court affirm the district court's order dismissing Hoffman's petition for post-conviction relief in all respects with the exception of the court's dismissal of Hoffman's claim that counsel was ineffective for failing to file a motion to suppress.

DATED this 24th day of October, 2011.




JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of October, 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARA B. THOMAS
CHIEF DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



JESSICA M. LORELLO
Deputy Attorney General

